

RICHARD C. SWAINBANK

IBLA 94-844, 95-260, 95-708

Decided October 20, 1997

Appeals from decisions of the Alaska State Office, Bureau of Land Management, denying a request for an exemption from rental fees, declaring mining claims abandoned, and denying a request for a refund of rental fees paid. AA-28922 et al.

Affirmed.

1. Mining Claims: Rental or Claim Maintenance Fees:
Generally

Under 43 C.F.R. § 3833.1-7(g) (1993) and 43 C.F.R. § 3833.1-6(d), a mining claimant may obtain an exemption from the payment of the rental fees or maintenance fees for mining claims and sites located on National Park System lands if (1) he has received a declaration of taking or a notice of intent to take from the National Park Service or has otherwise been formally denied access to his mining claims or sites on National Park Service lands by the United States, and (2) he timely provides proof of those conditions for exemption. The BLM properly requires claimants who apply for the exemption to demonstrate that they have actually sought access to their claims and that such access has formally been denied.

2. Mining Claims: Determination of Validity--Mining Claims: Plan of Operations--National Park Service: Land: Generally--National Park Service: Land: Mining

Although a final determination that a claim is invalid for lack of discovery can be made only after a contest proceeding, the mere location of a claim does not presumptively make it valid, and an agency operating under a mandate to minimize surface disturbance may properly require a mining claimant to affirmatively establish the discovery of a valuable mineral deposit before allowing operations to proceed.

3. Mining Claims: Assessment Work

Assessment work has nothing to do with locating or holding a claim before discovery, but it has been characterized as a condition subsequently prescribed by Congress, to be performed in order to preserve the exclusive right to the possession of a valid mineral land location upon which discovery had been made.

4. Mining Claims: Assessment Work--National Park Service: Land: Generally--National Park Service: Land: Mining

An exemption from mining claim maintenance and rental fees for unpatented mining claims located in the National Park System on the ground of denial of access at a minimum must be supported by a showing that access actually was sought, and that it was formally denied.

5. Mining Claims: Abandonment--Mining Claims: Rental or Claim Maintenance Fees: Generally

Where a mining claimant fails to qualify for an exemption from the rental or maintenance fee requirement, failure to pay fees in accordance with the statutes and regulations conclusively constitutes an abandonment or forfeiture of the claim.

APPEARANCES: Richard C. Swainbank, pro se.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Richard C. Swainbank has appealed from two decisions 1/ of the Alaska State Office, Bureau of Land Management (BLM), denying requests for exemption from payment of rental and maintenance fees for claims located in Denali National Park, and for refunds of fees paid. Events occurred as follows. On August 30, 1993, under protest, Swainbank submitted payment of \$5,000 in rental fees for 25 claims 2/ for the 1992 and 1993 assessment years. The rental fees were required by the Department of Interior and

1/ A duplicate of Appellant's Notice of Appeal/Statement of Reasons dated Sept. 10, 1995, was erroneously docketed as IBLA 95-708, and is dismissed.

2/ Rental fees were paid for the following claims: AA-28931 and AA-28932 (NIM #13 and #14); AA-28934 through AA-28940 (NIM #16 through #22); AA-28942 through AA-28948 (NIM #24 through #30); AA-28961 and AA-28962 (NIM #43 and #44); AA-28973 through AA-28976 (NIM #55 through #58); and AA-28979 through AA-28981 (NIM #61 through #63).

Related Agencies Appropriations Act for Fiscal Year 1993 (the Appropriations Act), Pub. L. No. 102-381, 106 Stat. 1378-79 (1992). On August 31, 1993, pursuant to 43 C.F.R. § 3833.1-7(g) (1993), he filed a request for exemption of 124 NIM claims that were not otherwise identified.

On September 29, 1993, BLM issued a notice providing Appellant 30 days in which to submit "a certified statement which specifically identifies the claims by serial number and claim name, along with acceptable evidence to show that access has been denied."

In his response to BLM's request for additional information filed on October 27, 1993, Appellant included a quitclaim deed that identified 130 instead of 124 NIM mining claims; ^{3/} a June 11, 1982, letter from the Alaska Regional Director, National Park Service (NPS), denying approval of his plan of operations and stating that the denial would constitute a reason for not performing assessment work; and other documents and correspondence. The June 1982 letter stated that Appellant's plan to conduct bulldozer trenching as annual assessment work was "an unacceptable method at the present time * * *. [W]e cannot approve a plan of operations as required under 36 CFR 9.9(a) that would include significant trenching."

In addition, Swainbank submitted correspondence that purported to document telephone conversations with NPS confirming that a Notice of Intent to Hold the claims would not result in a mining claim contest, as well as a copy of a Notice of Intent to Hold for 1993.

The BLM forwarded Appellant's submission to NPS for its view of whether the criteria for exemption set forth in 43 C.F.R. § 3833.1-7(g) (1993) had been met. In a memorandum to BLM dated March 19, 1994, the NPS Regional Director noted that "[s]ince the 1985 approved proposed plan of operations for sampling, claimant Swainbank has not submitted a proposed plan of operations for any other operational or mining purpose." Referring to other letters from NPS submitted by Swainbank, the memorandum stated:

They do not constitute a denial of the ability to operate on his claims such as might be indicated by a declaration of taking, or

^{3/} The 130 claims for which Appellant sought the exemption, which included the 25 identified in n.1, are AA-28922 through AA-28950 (NIM #4 through #32); AA-28956 through AA-28991 (NIM #38 through #73); AA-28997 through AA-29003 (NIM #79 through #85); AA-29007 through AA-29022 (NIM #89 through #103, including NIM #92A); AA-29028 through AA-29031 (NIM #109 through #112); and AA-29038 through AA-29075 (NIM #119 through #156). While the serial numbers and claim name numbers are as set forth in the decisions on appeal, the claims are named NIM and N.I.M. claims, but for convenience, we will refer to all of them as the NIM group.

a denial by the NPS of a complete plan of operations for reasons that might be determined to constitute a taking of property compensable under the Constitution. As of this date, the claimant has not submitted any such proposed plan of operations; therefore, the NPS has not denied him the ability to so operate.

Quoting the NPS memorandum, BLM issued its Decision on July 28, 1994, in which it concluded that Appellant had failed to show that the claims qualified for the exemption and declared 105 of those mining claims abandoned and void for failure to pay rental in the amount of \$100 per claim. With respect to Appellant's request for refund of rental fees paid under protest for the 1992 and 1993 assessment years for the remaining 25 claims, BLM referred to 43 C.F.R. § 3833.0-5(v)(2) (1994), which states that rental fees are not refundable unless the mining claim is determined to have been null and void as of the date the fees were paid. Swainbank's appeal from this rental fee decision was docketed as IBLA 94-844. Appellant's Notice of Appeal/Statement of Reasons (SOR) was dated September 19, 1994, and received by BLM on September 26, 1994. A Supplemental SOR dated September 10, 1995, was filed with this Board on September 21, 1995.

On August 25, 1994, Swainbank paid the claim maintenance fees for the 25 claims described above under protest. The maintenance fees are required by section 10101(d) of the Omnibus Budget Reconciliation Act of 1993, 30 U.S.C. § 28f(d) (1994). On August 30, 1994, he filed a petition seeking exemption from payment of maintenance fees for the 25 claims for which fees had been paid, as well as those declared abandoned and void for failure to pay claim rental fees by the July 1994 Decision. On February 3, 1995, in a Decision that acknowledged receipt and consideration of Appellant's additional information, BLM denied his request for an exemption from claim maintenance fees, and denied his request for a refund of the maintenance fees paid, based on the same reasoning and analysis supporting the July 1994 Decision. Swainbank's appeal from this maintenance fee Decision was docketed as IBLA 95-260. Swainbank's SOR was dated February 20, 1995, and received by BLM on February 23, 1995. Appellant's cover letter also contained relevant information. The SOR's in both appeals are virtually identical.

At Appellant's request, we consolidate both appeals for consideration because they involve the same claims and raise the same issue of the eligibility of claims within a National Park for an exemption from the fees in question. See Appellant's Feb. 20, 1995, letter.

The BLM's 1994 Decision referred to the Appropriations Act, a provision of which requires that each claimant "pay a claim rental fee of \$100 to the Secretary of the Interior or his designee on or before August 31, 1993, for each unpatented mining claim, mill site or tunnel site to hold such claim for the assessment year ending at noon on September 1, 1993." The Appropriations Act also contained an identical provision establishing rental fees for the assessment year ending at noon on

September 1, 1994, requiring payment of an additional \$100 rental fee on or before August 31, 1993. 106 Stat. 1378-79. The maintenance fee legislation upon which BLM's 1995 Decision was based also requires an annual payment of \$100 per claim from 1994 to 1998. 30 U.S.C. § 28f(a) (1994).

In Ahtna, Inc., 139 IBLA 89, 92 (1997), we noted that the Appropriations Act created only one exception to its requirements, the small miner exemption, available to claimants holding 10 or fewer mining claims, mill sites, or tunnel sites on Federal lands who meet all the conditions set forth in 43 C.F.R. § 3833.1-6(a) (1993). The maintenance fee legislation likewise provides an exemption only for small miners, 30 U.S.C. § 28f(d) (1994), which obviously was not available to Swainbank because he held more than 10 claims on Federal lands. Despite the statutory limitation on exceptions to the rental fee requirement, BLM's regulations have provided other exemptions from the rental and maintenance fees, including one for claims in National Park System lands where the claimant had been denied access to perform assessment work. 43 C.F.R. § 3833.1-7(e),(g) (1993) (rental fee exemption); 43 C.F.R. § 3833.1-6(d) (maintenance fee exemption).

The BLM provided the following justification for the additional exemptions in the preamble to its rental fee regulations: "[D]uring debate on the Senate floor on the Act, it was stated and not disputed that claimants who cannot perform assessment work because of legal impediments should not have to pay a fee. This statement may be taken as evidence of congressional intent on this issue." 58 Fed. Reg. 38193 (July 15, 1993).

[1] With respect to claims in a National Park, 43 C.F.R. § 3833.1-7(g) (1993) provided as follows:

[U]nder the following circumstances, an exemption may be obtained from the payment of the rental fee for mining claims and sites located upon National Park System lands:

(1) The claimant has received a declaration of taking or a notice of intent to take from the National Park Service pursuant to sections 6 and 7 of the Act of September 28, 1976, as amended (16 U.S.C. 1905, 1906) or the Act of December 2, 1980, as amended (16 U.S.C. 3192); or the claimant has otherwise been denied access by the United States to his/her mining claims or sites on National Park Service lands.

(2) The claimant shall provide proof of the above conditions for exemption, filed as a certified statement, by August 31, 1993, with the proper BLM office.

(Emphasis added.) The conditions for exemption from claim maintenance fees for claims in a National Park under 43 C.F.R. § 3833.1-6(d) are substantially the same. As will appear below, the emphasized language is at the heart of Appellant's argument on appeal.

In the Preamble to its final rental fee regulations, BLM provided the following explanation for the requirement:

Denial of access means that BLM, in consultation with NPS, has determined as reasonable the claimant's assertion that he has been denied the ability to operate on his claims. This would include situations where the NPS has permanently denied authorization to the claimant to exercise rights to the mining claim. Concerning the forms of exemption proofs that would be acceptable, these would include copies of declarations of takings, or NPS letters that state the denial of access, or any other judicial or administrative order. A declaration by the claimant alone will not be acceptable. When a claim holder has been denied access to his/her mining claims by the NPS, the claim holder is not required to obtain a deferment of assessment work from BLM pursuant to 43 CFR part 3852 in order to be exempt from the rental fee requirement.

58 Fed. Reg. 38195 (July 15, 1993). The references to "declarations of takings," "letters," or other "order" suggest that an exemption would be recognized only when a claimant submits a document showing that he had formally been denied access to a particular claim.

Appellant's argument in both appeals is essentially the same: he contends that the NPS will not approve a plan of operations until it determines the validity of a claim, citing the published remarks by Senator Murkowski in hearings in Alaska. Mining Activities in Units of the National Park Service in Alaska: Hearing before the Subcomm. on Public Lands, National Parks and Forests of the Senate Comm. on Energy and Natural Resources, 102d Cong., 1st Sess. (1993). He states that the NPS does not consider his claims to be valid, citing a September 30, 1991, Mineral Report that concludes that there has been no discovery of a valuable mineral deposit on the claims and recommends that a contest be initiated. Under these circumstances, he contends that "NPS * * * could not have approved a plan" and that "application for a Plan of Operation[s] from the NPS for any significant work is a futile exercise."

We note that a claimant must submit a plan of operations approved in accordance with 36 C.F.R. § 9.3(a) and (b) as a prerequisite to issuance of an access permit. The NPS regulation at 36 C.F.R. § 9.9(a) states that no operations shall be conducted without an approved plan of operations, and that all operations shall conform to the approved plan. Appellant supports his argument by citing the following NPS regulation that provides in part:

No access permits will be granted solely for the purpose of performing assessment work in these units except where claimant

establishes the legal necessity for such permit in order to perform work necessary to take the claim to patent, and has filed and had approved a plan of operations as provided by these regulations.

36 C.F.R. § 9.7(b)(2); see also 36 C.F.R. § 9.3.

In response to a similar argument in Ahtna, supra, at 94, we noted that NPS rejected Ahtna's proposed plan of operations as incomplete because the location of the claim boundaries had not been established, but specifically authorized access to Ahtna's claims by fixed-wing aircraft to conduct surveys on foot to locate existing claim corners and discovery points. We found no reason to believe that Ahtna could not have obtained the same authorization for the remaining claims for which NPS also required finalization of location.

Because we found in Ahtna that the claimant had access to its claims, we did not reach the issue of whether the NPS regulation itself "otherwise * * * denied access by the United States to * * * mining claims or sites on National Park Service lands" within the meaning of 43 C.F.R. § 3833.1-7(g) (1993) or 43 C.F.R. § 3833.1-6(d). On its face, 36 C.F.R. § 9.7 appears to preclude approval of any plan for performing assessment work, even for a valid claim, except where performance of the work is necessary to take the claim to patent, see 30 U.S.C. § 29 (1994). According to Appellant, this constitutes a "legal impediment" to the performance of assessment work as contemplated in the Senate floor debate that BLM took as "evidence of congressional intent." See 58 Fed. Reg. 38193 (July 15, 1993).

The cited NPS regulation implements the Mining in the Parks Act, 16 U.S.C. §§ 1901-1907 (1994), a provision of which reads:

[A]ll mining operations in areas of the National Park System should be conducted so as to prevent or minimize damage to the environment and other resource values, and, in certain areas of the National Park System, surface disturbance from mineral development should be temporarily halted while Congress determines whether or not to acquire any valid mineral rights which may exist in such areas.

16 U.S.C. § 1901(b) (1994). In implementing this legislation, the NPS determined that "little or no discretion is vested with the Secretary to allow additional surface disturbance, except as expressly authorized by the Act." 42 Fed. Reg. 4836 (Jan. 26, 1977).

To accept Swainbank's construction of the NPS regulations as per se constituting a "legal impediment" to the performance of assessment work in the absence of an application by each claimant would be to create a general exemption for virtually every claim in a National Park, without regard to whether the individual claimants have any desire or intention to perform

the assessment work. See 36 C.F.R. § 9.7(b)(2). Such a broad construction of the NPS regulations would perpetuate the speculative holding of claims and thwart a principal purpose of the rental fee legislation, "to eliminate stale or worthless claims as encumbrances on public land." See Kunkes v. United States, 78 F.3d 1549, 1552 (Fed. Cir. 1996). Clearly, when BLM promulgated regulations implementing the rental fee legislation, a blanket exemption for claims in National Parks was not contemplated nor intended.

The issue in these appeals is whether a claimant can be eligible for the exemption on the basis of the denial of access without actually seeking access. The regulations recognize that claimants who have not sought access to their claims have not encountered an impediment. Thus, BLM properly requires claimants who apply for the exemption under 43 C.F.R. § 3833.1-7(g) (1993) or 43 C.F.R. § 3833.1-6(d) to demonstrate that they have actually sought access and that such access has formally been denied. Such a construction is consistent with the decision in United States v. Vogler, 859 F.2d 638 (9th Cir. 1988), where the court held that the holder of a mining claim in a National Park who has not attempted to apply for a permit or submit a mining plan cannot assert a takings claim based on a denial of access.

[2] We recognize that a final determination that a claim is invalid for lack of discovery can be made only after a contest proceeding. See United States v. O'Leary, 63 Interior Dec. 341 (1956). We also recognize, however, that the mere location of a claim does not presumptively make it valid and that an agency operating under a mandate to minimize surface disturbance may properly require the mining claimant to affirmatively establish the existence of a valid existing right, i.e., a discovery of a valuable mineral deposit, before allowing operations to proceed. See, e.g., Southern Utah Wilderness Alliance, 125 IBLA 175, 188-89, 100 Interior Dec. 15, 22-23 (1993); Doyle Cape, 79 IBLA 204, 207 (1984); Havlah Group, 60 IBLA 349, 361, 88 Interior Dec. 1113, 1121 (1981), appeal dismissed without prejudice, Havlah Group v. Watt, Civ. No. 82-1018 (D. Idaho Nov. 16, 1982).

[3] Furthermore, not every operation that a mining claimant may propose qualifies as assessment work, 4/ so that the question of whether the

4/ "Assessment work" is a term for the requirement that "not less than \$100 worth of labor shall be performed or improvements made each year" on each claim. 30 U.S.C. § 28 (1994). See Union Oil Co. of California v. Smith, 249 U.S. 337, 349-50 (1919). Although a mining claimant who remains in continuous, exclusive occupancy and diligently works towards making a discovery is protected in possession of his claim, such activity does not necessarily constitute the performance of assessment work. Id.

NPS policy has resulted in an impediment to the performance of assessment work for a particular claimant can be determined only on a case-by-case basis. An agency operating under a mandate to minimize surface disturbance may properly require a mining claimant to affirmatively establish the discovery of a valuable mineral deposit before allowing an approved plan of operations to proceed. Such a determination obviously is relevant to whether the denial of access would result in an impediment to the performance of assessment work. As the Court observed in Union Oil Co. of California v. Smith, 249 U.S. 337, 350 (1919):

"[A]ssessment work" had nothing to do with locating or holding a claim before discovery. On the contrary[,] it was the condition subsequent[ly] prescribed by Congress to be performed in order to preserve the exclusive right to the possession of a valid mineral land location upon which discovery had been made.

As noted, the March 17, 1992, Mineral Report suggests that the NIM claims are not supported by a discovery, as shown by the recommendation of a mining contest. Appellant appears to concede the lack of discovery in arguing that he would be seeking access solely to conduct assessment work and further arguing that NPS is required to deny access after the date of the Mineral Report. Insofar as official action on a permit application is predicated on the approval of a plan of operations, Appellant states that no plan was submitted for approval because until "in 1991 (?)," 5/ NPS was enjoined against approving plans in Denali National Park. (SOR at 2.) He contends that with the completion of the 1992 Mineral Report, NPS "could not have approved a plan." *Id.* Swainbank concludes that "application for a Plan of Operation[s] from the NPS for any significant work is a futile exercise." *Id.* Appellant therefore did not submit a plan after the initial submission in 1982.

[4] Appellant's ultimate conclusion, that he is relieved of actually seeking access to conduct an activity that would qualify as assessment work because denial would have been inevitable, misses the very essence and point of the regulations when a formal request for access culminates in a decision denying the request, it results in a written response to the permit application or plan of operations that states the specific grounds and authority therefor; it is the official decision that provides the basis for official action on a requested exemption. Accordingly, we hold that an exemption from the claim maintenance and rental fees for unpatented mining claims located in the National Park System on the ground of denial of

5/ Appellant's Feb. 20, 1995, cover letter states the period of the injunction as July 1985 to January 1992. The discrepancy does not affect our decision nor our analysis.

access at a minimum must be supported by a showing that access actually was sought, and that it was formally denied. In this case, Appellant has admitted that he did not seek access and thus he cannot show that he was "denied access by the United States" within the meaning of 43 C.F.R. § 3833.1-7(g) (1993) or 43 C.F.R. § 3833.1-6(d) (1996). Accordingly, we hold that BLM properly denied Appellant's requests for exemption from the claim rental fee and claim maintenance fee requirements. To hold otherwise would be to establish a blanket exemption from rental fees for all claims in National Parks, which would be inconsistent with NPS' surface management responsibilities and the Appropriations Act's imperative to eliminate stale or worthless claims.

[5] Where a mining claimant fails to qualify for an exemption from the rental or maintenance fee requirement, failure to pay fees in accordance with the statutes and regulations conclusively constitutes an abandonment or forfeiture of the claim. 30 U.S.C. § 28i (1994); Pub. L. No. 102-381, 106 Stat. 1378-79 (1992); see Harlow Corp., 135 IBLA 382 (1996); Lee H. and Goldie E. Rice, 128 IBLA 137, 141 (1994). Even where extenuating circumstances are asserted, the Department is without authority to excuse lack of compliance with the rental fee requirement of the Appropriations Act, to extend the time for compliance, or to afford any relief from the statutory consequences. Michael Nemeth, 138 IBLA 238, 241 (1997). Because Appellant submitted rental fees for only 25 of the 130 claims, BLM properly declared the other 105 claims abandoned and void.

Appellant's request for a refund of the fees paid for 25 claims would have pertinence only if we had reversed BLM's denial of an exemption for those claims. Because the claims were not exempt, collection of the fees was proper. In denying Appellant's request for a refund, BLM referred to 43 C.F.R. § 3833.0-5(v)(2) (1993), which provided that rental fees are not returnable unless the mining claim or site has been determined, as of the date the fees were paid, to be null and void ab initio, or abandoned and void by operation of law. Because Appellant's claims were not deemed to be null and void ab initio or abandoned and void at the time the fees were paid, the request for a refund is properly denied. See Richard A. Magovich, 133 IBLA 114 (1995).

We now turn to consider Appellant's 1995 appeal from BLM's Decision denying an exemption from the claim maintenance fees required by 30 U.S.C. § 28f(d) (1994). Because we have ruled that 105 of Appellant's 130 claims properly were declared abandoned and void as a result of failure to pay rental fees by August 31, 1993, the scope of the second appeal is narrowed to the 25 claims for which rental fees were paid. As noted above, the conditions for exemption from claim maintenance fees for claims in a National Park under 43 C.F.R. § 3833.1-6(d) are substantially the same as with respect to claim rental fees. Appellant has offered no additional reason why his claims should be exempt from the maintenance fees and relies on the same arguments that he offered in support of his request for exemption from

the rental fees. Thus, we must affirm BLM's denial of exemption from the maintenance fees for the same reasons we affirmed the denial of the exemption from the rental fees, and accordingly, the denial of Appellant's second refund request must likewise be affirmed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decisions appealed from are affirmed.

T. Britt Price
Administrative Judge

I concur:

David L. Hughes
Administrative Judge